MINUTES OF THE
MEETING OF THE SENATE COMMITTEE
ON COMMERCE AND LABOR

SIXTY-FIRST SESSION.
NEVADA STATE LEGISLATURE
February 18, 1981

The Senate Committee on Commerce and Labor was called to order by Chairman Thomas R. C. Wilson at 1:40 p.m., Wednesday, February 18, 1981, in Room 213 of the Legislative Building, Carson City, Nevada. Exhibit A is the Meeting Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Senator Thomas R. C. Wilson, Chairman
Senator Richard Blakemore, Vice Chairman
Senator Don Ashworth
Senator Melvin Close
Senator William Hernstadt
Senator William Raggio
Senator Clifford McCorkle

STAFF MEMBERS PRESENT:

Samuel F. Hohmann, Senior Research Analyst
Betty Steele, Committee Secretary

SENATE BILL NO. 221--Repeals exemption of telegraph and telephone company employees from militia and jury duty.

Senator Glaser stated he was introducing Senate Bill No. 221 on behalf of Judge Joseph McDaniels, District Judge, Fourth Judicial District. The judge felt the exemption for telegraph and telephone company employees from militia and jury duty, should be removed because of obsolescence. The judge did not feel he could absent himself from his court duties to testify and asked Senator Glaser to present his thoughts on this subject to the committee.

SENATE BILL NO. 191--Removes limit on number of appeals officers.

Mr. James Salo, an appeals officer with the department of administration, stated the purpose of this bill is to remove the statutory

limit on the number of appeals officers the governor may appoint. Presently, only two appeals officers may be appointed. He stated the Nevada industrial commission has experienced a rapid growth in caseloads, particularly in southern Nevada. Mr. Salo presented a handout to the committee, illustrating the caseload growth. (See Exhibit C.)

Mr. Salo explained that a two-level appeals office has been established. The lay hearing officer is the initial level, and the claimant or employer may appeal to the appeals officer level. More formalized legal procedures are required in a hearing before an appeals officer, and more time is required for that process. The appeals officer level is the last administrative review before the case is taken to the district courts. Because of the great increase in caseloads, the appeals officers have been delayed in passing decisions.

Under statutory mandates, appeals officers are required to set and hold hearings promptly; as well as to promptly issue decisions. Mr. Salo stated decisions have been delayed up to six months. He has voluntarily been going to southern Nevada for hearings, one week per month, to help the officer there in his caseload. He said the southern Nevada appeals officer is falling behind at the rate of ten cases per month.

Senator Wilson asked if there was a provision in the budget to fund the third appeals officer. Mr. Salo replied the third appeals officer was in the next biennium's budget request, and has been recommended by the governor. He added that if this measure is passed, the finance committees will be asked to make a special advance appropriation for the balance of this current fiscal year to allow for the appointment of another appeals officer as soon as possible.

Mr. Salo predicted that appeals under the self-insured program will take longer, because most of the self-insured employers will be represented by counsel in order to make a full-fledged presentation. The employers are also making an effort to present all possible evidence because they are inexperienced in this process.

Senator Blakemore asked what impact the three-way bill would have on the appeals officers' caseloads. Mr. Salo replied the claimants would still have the right to appeal to his office the decisions of the self-insured carriers. He said he expects a leveling-off of the number of appeals; but indicated that those appeals

reaching his office would be more hotly contested and take longer to resolve.

Mr. Claude Evans, deputy treasurer for the State AFL-CIO, also spoke in support of Senate Bill No. 191. He said a serious problem was created by the delays in the appeals decisions. He said that justice delayed is justice denied. He submitted six sample cases which had taken six to seven months to get an appeals decision. (See Exhibit D.)

Mr. Joe Nusbaum, chairman of the Nevada industrial commission, also testified in support of Senate Bill No. 191. He felt it was unfair to the claimant to give him the right of appeal but deny him an effective way to have his appeal heard and decision made in a timely fashion. The Advisory Board of Review Report to the committee and the governor criticized the staffing of the appeals board as being insufficient to render timely decisions.

SENATE BILL NO. 187--Specifies generic drugs which may be substituted for proprietary drugs.

Mr. Joe Midmore, representing the state board of pharmacy, said this bill was an attempt to resolve the situation resulting from delay by the U.S. Food and Drug Administration in publishing a list of generic equivalents to proprietary drugs. However, he stated the U.S. Food and Drug Administration list was finally released 60 days ago, making this bill unnecessary. He said that Senator Lamb, who introduced the legislation, had asked Mr. Midmore to notify the committee that the bill was no longer required.

Senator Hernstadt suggested using Senate Bill No. 187 as a vehicle mandating pharmacists to use generic substitutions. Mr. Frank Titus, chairman of the Nevada state board of pharmacy, stated the present law states pharmacists do not have to use generic substitutions unless they so desire. He said the present law requires the pharmacy to post a sign saying generic drugs are available; but it does not require them to furnish a particular generic drug. If the pharmacy does not wish to do so, they are only required to inform the patient that a substitute is available at another pharmacy.

Senator McCorkle questioned the physican's role in the use of generic drugs. Mr. Titus explained if the physician writes a trade name on the prescription form, and signs on the left side of the prescription form, a substitution is permitted. Senator McCorkle then suggested the board inform every physician the FDA list is available for substituting generic drugs.

Senator Raggio asked how the patient knows the generic drug or brand name has been specified on the prescription. Mr. Titus replied the patient does not really know but must ask the pharmacist.

Mr. Keith McDonald, chief of medical services, Nevada state welfare division, stated he is opposed to Senate Bill No. 187 due to the fact that greater product selection was available through the use of the drug equivalent list issued by the U.S. Food and Drug Adminstration.

Mr. Orvis Reil, representing the National Retired Teachers' Association, the American Association of Retired Persons, stated he also is in opposition to the measure.

SENATE BILL NO. 202--Increases fine for violation of certain laws by contractors.

Mr. Tom Cooke, representing the state contractors' board, stated the board does not object to Senate Bill No. 202. He said he felt the minimum fine should be raised. He also felt that judicial discretion should be allowed in deciding the penalties for offenders. He said judges might be reluctant to fine offenders a mandatory $500 penalty because it is too extreme.

Mr. Charles Thomas, secretary of the state contractors' board, said that complaints of contractors get a low priority from prosecutors. He felt raising the minimum fine and enforcing that fine, would be a deterrent.

Senator Raggio suggested changing the law to make the first offense a misdemeanor and the second offense a gross misdemeanor. The gross misdemeanor offender could be fined up to $1,000.00 as well as receive a jail sentence.

Mr. Thomas suggested not making the second offense a gross misdemeanor; but making the offense punishable by a fine of $500.00 within a set period of one year. He noted that present statutes allow issuance of an injunction preventing those with previous offenses from operating at all.

Mr. Cooke stated the $500.00 fine is an insignificant penalty for the offender in most cases. He said the unlicensed contractor who cheats the public and does not receive an adequate penalty is one of the things which hurts the construction industry's image with the public.

Senator Hernstadt suggested eliminating the language dealing with the penalty in the bill and leaving the offense a misdemeanor; which is punishable by a fine up to $500.00 and a jail sentence up to six months.

Senator McCorkle asked why the conviction rate was only ten percent. Mr. Thomas replied that more contractors are pleading not guilty to the charge, thus creating a backlog, and many of the accused flee. He stated there are approximately 70,000 backlogged bench warrants in Clark County because the bench warrant for contracting without a license has such a low priority.

Mr. Midmore, representing the Nevada chapter of the American Subcontractors' Association, testified in support of Senate Bill No. 202. He said the association has requested a similar bill which changes the minimum fine to $300.00 to give the judges some discretion. The association would accept Senator Raggio's suggestion to make the second or third offense a gross misdemeanor.

SENATE BILL NO. 213--Limits regulation to certain trust companies.

Mr. Joseph Sevigny, superintendent of banks, banking division, department of commerce, opposed Senate Bill No. 213 because it will eliminate individuals, partnerships and associations from being licensed as trust companies. It eliminates individuals who establish sole proprietorships and are involved in nothing but trust business, from being licensed as well. He presented an explanation of the present laws and explained the bill made an attempt to cover certain situations which obviously needed to be changed. (See Exhibit E.)

Senator McCorkle asked what would be done for the person who is retired with the principal occupation of managing his own money. Mr. Sevigny stated he would use the prudent manner rule in these cases. He said there are obvious areas in the law, however, which should be made more explicit.

Mr. Sevigny explained his intent on point three under the explanation of NRS 669.080, was to include both attorneys and the individual, if fiduciary was not his principal occupation. He said the legal definition of the fiduciary relationship is very broad and includes any third party transaction. Mr. Sevigny stated the terminology of those trusts changes constantly and, in order to remove fiduciary relationships from the law, every other kind of trust would have to be specifically delineated.

Senator Wilson asked why the term "fiduciary" could not be changed to "trustee". Mr. Sevigny replied that problems would arise when

someone other than a trustee, like an agent, handles a trust account. He cautioned against making the wording in the law so specific as to allow individuals to establish trust companies and operate them as their sole businesses. He felt such individuals should be licensed.

Senator Don Ashworth suggested exempting any person who is a fiduciary for himself or any family member, as well as anyone who is nominated to be a trustee of a trust. Mr. Sevigny felt, in the latter case, an individual could solicit for trusts, and should be licensed.

Senator Wilson said the line must be drawn between the freedom of an individual to designate a friend or relative to take over and handle the trust for him versus an individual who has solicited to take over a trust. Mr. Sevigny stated the drawing of the line at "principal occupation" would accomplish this. If it is an individual's principal occupation, he should be licensed.

Mr. Sevigny stated point number four, under NRS 669.080 (see Exhibit E.) should be changed to exclude all escrows, not just collection escrows. He also had no objections to the removal of "receive no fee or other compensation for services rendered" on point five.

Senator Wilson said Senate Bill No. 213 would be confusing because it approaches this question from the negative viewpoint. He asked if the wording could be reversed to state what a trustee could do. Mr. Sevigny, said he did not feel that the measure, as presently drafted, would work at all. Senator Wilson suggested Mr. Sevigny ask the bill drafter to draft an amendment which would incorporate the points discussed at this meeting.

There being no further testimony on Senate Bill No. 213, the hearing was closed.

Chairman Wilson stated that, if there were no objections, he would change the Nevada industrial commission's draft requests to committee requests to facilitate drafting the bills. There were no objections.

The chairman then asked for consideration on Senate Bill No. 202.

Senator Hernstadt thought the wording should be changed to a standard misdemeanor provision to give judges flexibility in sentencing offenders either to a jail term or a fine.

Senator Close stated the specification was originally put in the legislation because the justices of the peace were traditionally meting out no fines.

Senator Don Ashworth moved that Senate Bill No. 202 be amended to read no less than $150.00 fine for the first offense and no less than $300.00 fine for the second offense within three years. (Exhibit F)

Senator Hernstadt seconded the motion.

The motion carried unanimously.

The chairman asked for consideration on Senate Bill No. 221. (Exhibit

Senator Hernstadt moved that Senate Bill No. 221 be approved.

Senator McCorkle seconded the motion.

The motion carried unanimously.

The chairman asked for consideration on Senate Bill No. 187.

Senator Blakemore moved that Senate Bill No. 187 be given no further consideration.

Senator Wilson seconded the motion.

The motion carried unanimously.

The chairman asked for consideration on Senate Bill No. 191. (Exhibit

Senator McCorkle moved that Senate Bill No. 191 be approved.

Senator Hernstadt seconded the motion.

The motion carried unanimously.

BDR 54-854 (SB 269)--Revises educational requirements and certain administrative procedures affecting real estate brokers and salesmen.

Chairman Wilson stated BDR 54-854 would be introduced unless the committee had objections. There were no objections.

Chairman Wilson asked for informal discussion on the reorganization of the public service commission. The Assembly committee on

MEETING OF THE SENATE COMMITTEE ON COMMERCE AND LABOR
FEBRUARY 18, 1981

Government Affairs subcommittee had asked for the feeling of the Senate Committee on Commerce and Labor on policy direction to enable the subcommittee to draft a bill. Senator Don Ashworth suggested the legislative counsel bureau staff study what savings by utilities were generated in other states having a public advocacy. Chairman Wilson stated he gave the report on savings in other states to the power company. He suggested putting the burden on the power company to prove the validity of the figures used. The question was asked as to how many times the public service commission approved a lower rate than that suggested by the staff. Senator Wilson stated public perception of the issue was an important point to consider.

Senator Wilson then stated the question was whether or not the committee wanted to form the office of consumer advocate and, if it did, under whose jurisdiction that position would fall.

The committee agreed on wanting to sponsor a bill to form a consumer advocacy agency. The general consensus was that the committee did not favor the governor's plan. They were agreed on the general idea of the consumer advocacy petition but felt that certain parts needed to be rewritten. It was clarified that this method would not alter the existing structure of the public service commission.

The place to house the consumer advocacy agency was debated. Senator Don Ashworth stated it should not be housed in the attorney general's office, because a conflict of interest would exist. Senator McCorkle commented the conflict could be resolved by allowing the public service commission to hire its own counsel. Senator Ashworth asked about the separation of powers within the government if the legislature takes over an executive responsibility. Senator Close stated the executive responsibility would rest with the public service commission. The consumer advocacy agency would become a legislative responsibility. Senator Don Ashworth agreed the point was valid. He asked, should the legislature as a legislative branch have administrative jurisdiction over this kind of function as opposed to the executive branch, which generally includes the attorney general.

It was suggested that the appointment be subject to the advice and consent of the legislature. Senator Ashworth stated that method would become a political nightmare. Housing under the attorney general's office would keep the function under the executive branch. The committee agreed the consumer advocate should be housed in the attorney general's office.

MEETING OF THE SENATE COMMITTEE ON COMMERCE AND LABOR
FEBRUARY 18, 1981

Senator McCorkle commented the advocate should have full jurisdiction to intervene to complain on a petition, should have the right to inspect books, and have the right to audit on a selective basis. He also said the advocate's right to respond to consumer complaints should be as selective as the advocate found necessary.

There being no further business, the meeting adjourned at 3:26 p.m.

Respectfully submitted,

Betty Steele, Committee Secretary

APPROVED BY:

Senator Thomas R. C. Wilson, Chairman

DATE: _____

EXHIBITS - FEBRUARY 18, 1981 MEETING

Exhibit A - Meeting Agenda.

Exhibit B - Attendance Roster.

Exhibit C - Caseload Statistics, Appeals Officers, submitted by Mr. Salo.

Exhibit D - Six Sample Delayed Decision Cases, submitted by Mr. Evans.

Exhibit E - NRS Sections and Suggested Changes Thereto, submitted by Mr. Sevigny.

Exhibit F - Copy of Senate Bill No. 202.

Exhibit G - Copy of Senate Bill No. 221.

Exhibit H - Copy of Senate Bill No. 191.

EXHIBIT A

AMENDED

SENATE AGENDA

COMMITTEE MEETINGS

Committee on Commerce and Labor, Room 213.

Day Wednesday, Date February 18, Time 1:30 p.m.

S. B. No. 191--Removes limit on number of appeals officers.

S. B. No. 187--Specifies generic drugs which may be substituted for proprietary drugs.

S. B. No. 221--Repeals exemption of telegraph and telephone company employees from militia and jury duty.

S. B. No. 202--Increases fine for violation of certain laws by contractors.

S. B. No. 213--Limits regulation to certain trust companies.

ATTENDANCE ROSTER FOR COMMITTEE MEETINGS

SENATE COMMITTEE ON Commerce and Labor

EXHIBIT B

DATE: Wednesday, 5/18

PLEASE PRINT	PLEASE PRINT	PLEASE PRINT	PLEASE PRINT
NAME	ORGANIZATION & ADDRESS		TELEPHONE
Orvis E. Reil	NRTA/AARP- Nevada Joint State Legislative Committee		882-1625
Charles Thomas	Nevada State Contractors Board		385-0101
James D. Salo	Dept. of Admin - Appeals Officer		885-5289
Joseph D Sevigny	Commerce - Banking		885-4260
Tom Cootie	State Contractors Board		329 1766
W Fabrizio	State w affairs		4771
K. McDonald	" "		4771
Joe Nusbaum	Nev. Industrial Commission		885-5284
Bing Oberle	Dept of Human Resources		885-4730
Keith McDonald	Welfare Dir		885-4775
Joe Midmore	State Pharmacy Bd + Am. Subcontractors		
H. Curtis	N.I.C.		
Blackie Egan	AFL-C.I.O		882 7490
Bob Shriver	NV Trial Lawyers		883-3577
Sharon Cleary	NV Assoc of Realtors		329-6648
Howard Fuener	Family Savings Reno		329 7406

STATE OF NEVADA

DEPARTMENT OF ADMINISTRATION

Hand-out- James Lalo 5th C

ROBERT LIST
Governor

HOWARD E. BARRETT
Director

HEARINGS DIVISION

EXHIBIT C

Wed 2/18 - 1:40

DEPARTMENT OF ADMINISTRATION

REPLY TO

APPEALS OFFICER

Number Of Cases Filed

	LAS VEGAS	CARSON CITY
7-1-77 to 12-31-77	101	-
1-1-78 to 6-30-78	98	-
7-1-78 to 12-31-78	68	-
1-1-79 to 6-30-79	116	-
7-1-79 to 12-31-79	242	101
1-1-80 to 6-30-80	196	56
7-1-80 to 12-31-80	179	74
1-1-81 to 2-17-81	55	22

February 18, 1981

EXHIBIT D

RECEIVED

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of BILLY CRANK, Claimant

Claim Number: 80-61389

Appeal Number: 1848

Appeal by the claimant from the decision of the Hearing Officer dated April 9, 1980.

Alan R. Johns, Esq., for the Claimant

Robert Gibb, Esq., for the Nevada Industrial Commission

R. O. Henderson, Esq. for the Employer, Reynolds Electrical and Engineering Company

D E C I S I O N

THE ABOVE-ENTITLED MATTER, having been heard on May 28, 1980, and June 5, 1980, and having been conducted in accordance with the provisions of Chapters 233B and 616 of the NRS; with testimony and evidence having been adduced, the case thereafter having been briefed with the last brief being recieved on August 28, 1980 and after having reviewed the case, the Appeals Officer finds as follows:

The claimant was injured in an auto accident on October 6, 1979, while traveling from his home in Las Vegas to the Nevada Test Site where he was employed as a rotary drill operator by Reynolds Electrical and Engineering Company (Reeco). The accident occured approximately two to five miles before the claimant reached the gate of the test site.

6 months

At the time of the accident, the claimant was riding in an automobile owned and operated by a fellow worker who was also traveling to work that morning. Reeco had no control over the method or route choosen by the claimant in coming to work.

The claimant's employment consisted of regular five-day workweeks, Monday thru Friday, from 8:00am to 4:30pm. October 6, 1979 was a Saturday and the claimant was enroute to perform a shift of overtime commencing at 8:00am and concluding at 4:30pm when the accident occured.

The general rule is that injuries occuring to employees off the employment premises are not compensable.[1] The claimant has chosen to rely upon several exceptions to this rule, inter alia, "Employee required to furnish own conveyance"[2], "Payment for time of travel"[3], "The special errand rule"[4], and "Overtime or rushwork"[5].

Employee Required To Furnish Own Conveyance

This exception provides coverage based upon the single fact that as part of the job the employee is required to bring his own car for use during his working day. The rationale is that such a requirement makes the employee's car a mandatory part of the employment environment. The claimant alleges that due to the great distances between his home and his job location, the use of a private vehicle in getting to his reporting point "and possibly to other locations" on the work site itself, the use of a private vehicle was "a necessity and benefits the employer."

---

1. Larson's Workmans Compensation Law, Vol.1, Ch.4,§15.00,et seq
2. ibid, §17.50.
3. ibid, §16.20.
4. ibid, §§16.10 and 16.11.
5. ibid, §16.12.

The proof in this case clearly established that once an employee reported to his reporting point at the test site all transportation including travel from one location to another on the test site was furnished by Reeco up to the conclusion of the work day. Reeco did not require this employee to furnish his own conveyance and, indeed, the claimant in this case was not in his own vehicle at the time of the accident but rather was participating in a car-pool arrangement with a fellow employee which is represented to be the common practice.

Payment For Travel Time

Claimant construes terms of his union contract as meaning pay for travel time. He reasons:

> "That if a person reports for work and there is no work available, he will receive at least 2 hours pay plus his subsistence pay allowed which is essentially consistent with the travel time involved. Thus, an employee is being paid travel time, either directly if he does not work or indirectly through subsistence and a guaranteed minimum hours of employment."

The question of whether the term "subsistence" may itself be construed as travel pay has been answered in the negative by the supreme court in a contract sitting essentially the same as the instant contract. N.I.C. v. Dixon 77 Nev 296, 362 P.2d 577 (1961) Subsistence as used in the instant contract is separate and distinct from travel pay for travel time. As in the Dixon contract, the instant contract contains a separate statement governing travel pay. The Dixon case is dispositive.

As to whether an automatic entitlement to two hours pay upon reporting to work can be construed as travel pay merely

because the amount may correspond to this claimants actual travel time, this proposition also lacks merit. Again, there is the specific contractual preclusion. As to whether there may exist an indirect relationship, the facts establish mere coincidence. By reading the whole of ARTICLE VII of the union contract, one observes several types of minimums, none of which bear a rational relationship to pay for travel time. For example, employees assigned to a rotating shift are entitled to an eight hour minimum. The contract also provides to employees who do some work an automatic entitlement to four hours pay, or eight hours pay depending upon the amount of work performed, regardless of how much of the four hour or eight-hour period is worked. In addition, a union leader called by the claimant testified that the two-hour minimum is a common provision and is present in Las Vegas Associated General Contractor agreements and that most of the people who work under this construction agreement do there work wholly within the Las Vegas area.

The Special Errand Rule

This rule involves the employee with regular definable work hours whose going to or from work may be covered by industrial insurance if the journey itself, or the duties performed between the journeys involve unusual circumstances. For example, the journey of an employee, who travels to and from the job site merely to switch on a light, is covered under the rationale that the making of the journey itself was the essence of what the employee was paid for.[6] Another example is the employee who returns to a store at night time to merely let in an electrician and is injured while returning home.[7] The

---

6. O'Reilly v. Roberto Homes, 107 A2d 9 (1954.
7. Kyle v. Green, 226 N.W. 71 (1929) C.F. Jonas v. Lillyblad, 137 N.W. 2nd 370 (1965).

essence of the special errand rule is that the service to be performed is out of the ordinary, unusual or one not contemplated by the terms of employment. As stated by Professor Larson, "There is less difficulty when the trip is one which is made everyday, is not in itself unusually long or burdensome, and not made for the performance of some brief service such as throwing a switch or unlocking a door." Professor Larson concludes that the test of this rule is whether the journey itself was a substantial part of the service for which the claimant was employed and compensated.[8] The key to this rule is the relative regularity or unusualness of the journey, that is, the difference between the instant case and the expectation of any other employee simularly situated with the same reasonably regular hours and place of work. Other variables are the relative "onerousness" of the specific journey compared with the extent of the service to be performed.

From the record adduced, the claimant was coming to work at his regular time to perform his regular duties. In essence the journey this claimant took on October 6, 1979 was indistinguishable from the many other journeys to his work that he had taken in the past and, indeed, the journeys engaged in by many of his co-employees who also worked a regular shift.

The claimant indicated that on October 6, 1979, he was to be a foreman and that his presence on that date was indispensable. The record in this regard is questionable in that a strong inference is present that if the claimant had declined to attend work that day, the work would have been performed anyway as, indeed, it was performed the very next day. In any case, the

---

8. LARSON , supra., §16.11, p.4-136

question as to whether the claimant was indispensable is irrelevant. Professor Larson states: "Relative indispensability can hardly be the test of status while coming and going."[9] Again the question is whether the journey is a substantial part of the service performed. The record in this case clearly established that the claimant was not performing a substantial service to his employer during his journey to work on October 6, 1979, that is, no different than any other employee who shows for work at his regular time and place.

Overtime Or Rush Work

The general rule is that ordinary overtime work does not increase the relative importance of the journey to and from work as part of the employment. The exceptions to this rule center around whether the employee's overtime work caused his journey home to be substantially more inconvenient or hazardous, or whether the longer hours produced a marked fatigue. This is clearly inapplicable here in that the claimant was going to work, again at his regular time, on his regular route, to perform his regular duties. Also, the claimant was not driving but merely a passenger, so fatigue is not a factor.

As to whether the claimant was returning to work to perform rush work, urgency in the trip seems to be the controlling factor. For example, an employee asked to rush home to get supper and then return, obviously renders his journeys to and from supper special errands.

In an effort to establish that the work to be performed on October 6, 1979 was "rush work", the claimant alleged that if the work that he was to perform that day was left undone, the

---

9. ibid

employer would lose fifteen to twenty thousand dollars a day. Apparently the claimant's contemplated work duties involved the preparation of a test hole so that a much larger drill rig could make the final boring. The inference sought to be drawn was that any delay in the use of the large drill rig would cost a substantial amount of money and thus an emergency existed. A picture of this large rig was produced and, indeed, it is easily infered that such a substantial piece of machinery would cost a great amount of money when idled. But Reeco produced proof to the effect that this large rig was owned by the federal government and was only an expense to Reeco when actually used by Reeco and, accordingly, the claimant's total inference fails.

As best as can be determined, the work to be performed by the claimant on October 6, 1979 was not in the nature of an emergency or rush work. The totality of the evidence supports the inference that Reeco works a seven-day schedule which, if it has any relevance, merely produces frequent opportunities for overtime rather than an atmosphere of emergency.

The claimant alleged that the employees of Reeco felt compelled to perform overtime work as a matter of job security. There were a lot of "you know's" and "ah shuck's" on this point and testimony on both sides of the issue. If the question of compulsion has some relevance to the rendering of the claimants journey to work that morning to the realm of service to his employer as a special errand, and this is not at all certain, the conflicting evidence adduced is found to support the inference that compulsion is but a very minor subjective consideration, with mercenary profit being the deciding factor on whether to accept or reject overtime opportunities.

The claimant also asserts that since overtime pay is termed

"premium" by the union contract that this somehow renders overtime a per se emergency. This assertion is patently absurd and summarily rejected.

Findings and Conclusions

1. During the morning of October 6, 1979, the claimant was injured in an auto accident while going to his place of employment.

2. The claimant's injuries occured off the employer's premises.

3. The purpose of the claimant's journey was to report to his regular job location, to perform his regular duties during his regular hours.

4. At the time of the accident, the claimant was a passenger in a car owned and operated by a fellow employee pursuant to the customary car-pool arrangement. Reeco had no control over the method or route chosen by the claimant in going to work.

5. The claimant was voluntarily reporting to work so as to perform an overtime shift consisting of his regular working hours.

6. At the time of the accident the claimant was not engaged in performing a service for his employer any different then that benefit rendered by any other employee who shows for work at his regular time and place. The claimant had already assembled a crew and his journey that morning involved merely reporting to work.

7. The claimant's journey to work for a regular overtime shift was substantially indistinguishable from his ordinary journey to perform his regular shift.

8. No emergency existed nor is there an adequate basis upon which to conclude that there existed a subjective belief of emergency.

9. The claimant was not receiving payment or wages for time of travel either to or from work.

10. The fact that the union contract contains provisions of minimum guarantees or subsistance allowances bears no rational or legal relationship to the payment for travel time.

Accordingly, the final commission staff determination denying this claim as affirmed by the Hearing Officer is hereby affirmed by the Appeals Officer.

Dated this 27th day of January, 1981.

APPEALS OFFICER

J. Michael McGroarty

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Review must be filed with the District Court within 30 days after service by mail of this Decision.

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of EUSEBIO ROJAS, Claimant

Claim Number: 79-62291

Appeal Number: 1820

Appeal by the Claimant from the decision of the Hearing Officer dated February 12, 1980.

Gerald F. Neal, Esquire, for the Claimant;

H. Douglas Clark, Esquire, for the Nevada Industrial Commission;

Linda Ramsey of the Gibbens Co., for the Employer, the Sahara Hotel

D E C I S I O N

THE ABOVE-ENTITLED MATTER, having been heard on April 29, 1980, and July 11, 1980, and having been conducted in accordance with the provisions of Chapters 233B and 616 of the NRS; with testimony and evidence having been adduced, and after having reviewed the case, the Appeals Officer finds as follows:

This claimant disagrees with the amount of the permanent partial disability awarded to him under this claim. The claimant has received a 12-percent award. He alleges that he has also sustained a psychoneurosis as a result of his industrial injury and is thus entitled to a larger award.

The Appeals Officer has examined the rating report filed in this case. The rating was conducted on November 9, 1979, by Frank E. Butters, a medical doctor designated by the commission to

perform such evaluations. The record reflects that the evaluation was properly conducted by Dr. Butters in accordance with the American Medical Association Guides to the Evaluation of Permanent Impairment as required at NRS 616.605. Dr. Butters found the claimant's physical impairment residuals to be 12 percent on a body basis. There was an indication of a possible mental component and, accordingly, Dr. Butters referred the claimant to a psychiatrist for evaluation.

On or about December 8, 1979, the claimant was seen and examined by Juan Carlos Laborati, M.D., psychiatrist. It should be noted that Dr. Laborati is fluent in Spanish. It is apparent from his report that the doctor conducted a rather extensive examination of the claimant. In his report, Dr. Laborati wrote:

> "The general affect (sic) display showed an individual with labile affect (sic) with a strong tendency of exageration (sic) of his emotions and who seems to be using manipulative emotional overtones oriented toward secondary gains. His natural reaction to stress seems to be beyond normal limits. He displayed a low threshold (sic) of frustration tolerance which most likely could be related to associated low threshold (sic) to pain. His neurotic tendencies has (sic) created a vicious cycle with marked hyperreaction, and actually, he seems to be feeding his past injury with his regressive incapacitation to maintain a status quo (passive agressive (sic) tendency) of his post traumatic neurosis."

The doctor concluded with a diagnosis of "post traumatic neurosis

with conversion hysterical features geared to secondary gain."

On May 12, 1980, Dr. Butters, after having reviewed Dr. Laborati's report, wrote the following:

> "Dr. Laborati's diagnostic impression is 'post traumatic neurosis with conversion hysterial features geared to secondary gain.' [¶] To me this means the claimant is putting on an act to gain additional compensation. In applying the AMA Guides this would, at most, be Class 1 psychoneurosis (neurosis). On page 153 it states 'The great majority of individuals in Class 1 should be rated at either 0% or 1% of the whole man . . . [¶] Based on the above, no additional impairment due to psychoneurosis is warranted."

Secondary gain is defined in Steadman's Medical Dictionary as "Increase; profit. . . The interpersonal or social advantages (i.e., assistance, attention and sympathy) gained indirectly from organic illness. . ." The gain in this appeal is obvious.

The Appeals Officer has examined the record in this case and concurs with Dr. Butters' conclusion that an additional permanent partial disability percentage for psychoneurosis is not warranted. Accordingly, the final commission staff determination of 12 percent permanent partial disability impairment as affirmed by the Hearing Officer is hereby affirmed by the Appeals Officer.

DATED this 4th day of February, 1981.

APPEALS OFFICER

J. Michael McGroarty

NOTICE: Pursuant to NRS 233 B. 130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Review must be filed with the District Court within 30 days after service by mail of this decision.

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of JEAN LEFORT, Claimant

Claim Number: OD78-25708

Appeal Number: 2061

Appeal by the Claimant from the decision of the Nevada Industrial Commission dated June 29, 1979.

Marvin S. Gross, Esquire, for the Claimant:

Robert D. Gibb, for the Nevada Industrial Commission

D E C I S I O N

THE ABOVE-ENTITLED MATTER, having been heard on November 16, 1979 and having been conducted in accordance with the provisions of Chapters 233B and 616 of the NRS: with testimony and evidence having been adduced thereafter the case having been briefed with the last brief being received July 25, 1980, and after having reviewed the case, the Appeals Officer finds as follows:

On May 26, 1978, the claimant filed a claim with the Nevada Industrial Commission alleging that his job duties as a heavy equipment operator for Sierra Pacific Power Company have caused him to develop a chronic low-back syndrome.

The claimant's specific duties with Sierra Pacific were to drive and operate an auger truck. The auger truck was a truck which has an auger bit on the back and is used by the Sierra Pacific Power Company to drill holes for power line poles. The particular truck which the claimant drove is commonly referred

to as the Oshkosh. The Oshkosh is a large four-wheel drive truck with the auger on the back end.

The Oshkosh is an older vehicle which the claimant drove for a ten-year period. The claimant's duties required him to drive the truck, pick up power poles, and then drive to the area where the work order required the poles to be set into the ground. When the claimant arrived at the job site he began the process of digging a hole. In the process of digging a hole the unit would begin bouncing around, since the Oshkosh had no springs or mechanism for stabilizing itself. The claimant stated that the impact of drilling and the impact while driving the Oshkosh was transmitted directly to his body because of the lack of springing as well as the lack of padding in the seats. Although not independently verified, it was the claimant's opinion that the driving of the Oshkosh and the drilling process was very rough on his body and caused his low-back pain to progress.

The claimant's medical history of low-back syndrome begins in 1960. The claimant first injured his back at work in 1960 and was granted a 3 percent body basis award by the Nevada Industrial Commission. During the healing period, the claimant was in traction for four weeks and thereafter on light duty for about one month. The claimant did not see a docter again for a low-back syndrome until the occurrence of a non-industrial accident in 1969.

In 1969, the claimant was run over by a taxi as he was crossing a street on the way to a haircut appointment. He injured his back, leg and hip on the left and was unable to walk.

On September 29, 1970, Dr. Morelli diagnosed a ruptured lumbar disc at L4, L5. On November 13, 1970, the claimant complained of persistent left leg difficulties and of severe neck pain with radiation into his upper extremity, particularly the

////

left. In the second week of January 1971 lumbar disc surgery was performed. Thereafter, the claimant was sent home for three months and then went back to work in a light-duty capacity for a month or so. Post operatively, the claimant continued to have persistent headache, neck pain, upper extremity pain, and left arm pain.

The claimant continued seeing Dr. Morelli each year following the taxi cab accident. In 1972 he had recurrent leg pain on the left, back pain and neck pain. Dr. Morelli stated, as far as the neck is concerned, that he has known discogenic disease in the neck from previous myleography. In 1973, Dr. Morelli describes espisodes of neck pain with radiation into the left shoulder and arm. The same general complaints were noted throughout 1974, 1975 and 1976 and in 1977. Dr. Morelli noted that the claimant had gained considerable weight, up to 185 pounds, when he should weigh around 147 pounds. Body weight can be a substantial causative factor in a low-back syndrome.

On May 26, 1978, the claimant filed the instant claim for an industrial injury stating that "while driving a truck (he) felt pain in (the) lower back". On the reporting form, Dr. Roberts noted low-back pain, but the doctor does not relate the problem to a work cause. The doctor indicated that the claimant would not be disabled from work for 5 days or more.

There is really very little medical reporting on this case. On November 6, 1978, Dr. Albert F. Peterman, a neurologist, reported as follows:

> "He has complained of pain in the low back and left upper extremity on and off ever since the (1969 car-related) accident but by 1973, had developed a fairly classic left sciatica which has persisted and very very slowly worsened

////

to the present time." (Emphasis added)

(NIC Exhibit E-9).

Dr. Peterman further notes that the claimant's straight leg raising is normal and back motions are full and that he has continued to work on a daily basis which the claimant confirmed in his testimony.

Finally, in December of 1978, Dr. Peterman concluded that the claimant "continues to work and is not disabled". Dr. Peterman told the claimant that he cannot treat him further medically.

Both parties agree that there are two issues in this case. The first issue centers around the question of causal relationship between the claimant's progressive low-back syndrome and his work duties with Sierra Pacific. The second issue involves the legal question of whether a series of micro traumas, or repetitive trauma may have a cumulative effect and thus be considered an "injury" by "accident."

On the question of causation, the claimant asserts, "If a series of repetitive traumas to the lower back which Mr. Lefort suffered over the ensuing eight-year period aggravated the condition of his low back area, then this condition should be considered compensable." The commission responds that "Based upon the medical reporting the Nevada Industrial Commission's position is that the claimant's present problems are not industrially related but are due to the 1970 (sic) accident when Mr. Lefort was run over by a taxi cab."

The only medical evidence presented tends to support the commission's assertion. The claimant sustained a significant spinal injury in 1969. In 1971 the claimant underwent an interlaminar exploration surgery at interspaces L4, L5 and L5, S1 with the removal of the L4, L5 disc. The respective nerve roots were exposed which usually leads to scar tissue which in turn is considered a causative factor in subsequent onset of spinal,

progressive discomfort. The claimant has returned to his doctor with symptoms of progressive spinal discomfort on a regular basis since the 1971 surgery. The only evidence that would tend to support the claimant's assertion is his own opinion that there is a causal connection between the operation of the Oshkosh and the gradual progression of his symptoms of spinal discomfort. The Appeals Officer finds that the claimant's progressive symptoms of spinal discomfort are most probably caused by the ordinary, expected sequelae of the 1971 surgery rather then effects traceable to his industrial environment.

As to whether "repetitive trauma" is recognized as a valid substitute for ordinary and statutory concepts of "injury" by "accident", the claimant argues that since there is no case authority within Nevada and that other states have accepted this type of causation, that this ought to be the law within Nevada. c.f. Smith v. Garside, 76 Nev 377, 355 P2d 849 (1960); Pershing Quicksilver v. Thiers, 62 Nev 3821, 152 P.2d 432 (1944); Periss v. N.I.C., 55 Nev 40, 24 P.2d 318 (1933).

"Repetitive trauma" is a concept that falls somewhere between injury by accident and occupational disease. Classically, injuries by accident require a discrete occurrence, certain in time, place and extent, manifesting immediate objective evidence of injury. As drafted in our statute, the terms "injury" and "accident" are essentially the same, as the plain meaning of these terms, as a layman would understand. NRS 616.020 and NRS 616.110 (1). Our occupational disease statute requires an exposure to an industrial hazard, unique to the work environment, and concentrates on the disease process, again, such as a layman would understand "disease process". NRS 617.440; c.f. NRS 617.445.

"Repetitive trauma" combines the two traditional concepts of accident and exposure into a format consisting of series of micro traumas. The case law in this area establishes that the

"repetitive trauma" concept presents a distinct and separate category of eligibility for industrial coverage. It is also apparent that acceptance of this third category would present substantial administrative and cost burdens. For example, some of the factors that immediately present are the elusiveness of proof, as amply demonstrated by the instant case, the subjective nature of the supportive medical opinion and the difficulty in separating the effects of cumulative or repetitive trauma from the effects of ordinary wear and tear incumbent in the aging process or the aging process itself. (see also: Commission's brief pp. 6-7.)

In the final analysis, to accept the concept of "repetitive trauma" would present a clear departure from the plain meaning of the words written by our legislature.

> "We agree with appellant that industrial insurance and workmen's compensation acts have for their purpose the putting of an end to private controversy and litigation between employer and employee, and also that the statutes do give to a workman what he never had before, namely the right to compensation for injuries suffered in employment, regardless of the negligence of the employer. But the Legislature can only be presumed to have intended this to the extent to which they have legislated. (Emphasis added) Pershing Quicksilver Co. v. Thiers 62 Nev. 382, 152 P.2d 432, 436, (1944), cited with approval in Firth v. Harrah South Shore Corp. 92 Nev. 447, 552 P.2d 337, 341 (1976). See also; Holt v. Ind. Comm., 94 Nev. 257, 578 P.2d 752 (1978).

The Nevada Industrial Insurance Act and the Nevada Occupational Disease Act have been actively reviewed and updated by our

legislature. While many concepts may present "better practice", "that determination must rest with the legislature." Holt v. Ind. Commin., supra.

The decision of the commission hearing examiner denying this claim is hereby affirmed by the Appeals Officer.

DATED this 29th day of January, 1981.

APPEALS OFFICER

Michael McGroarty

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the appeals officer, a Petition for Review must be filed with the District Court within 30 days after service by mail of the Decision.

RECEIVED

BEFORE THE APPEALS OFFICER

In the Matter of the Contested Industrial Insurance Claim of LALA GONZALES, Claimant	Claim Number: 76-53134 Appeal Number: 1719

Appeal by the Claimant from the decision of the Hearing Officer dated September 26, 1979.

Roy L. Nelson II, Esquire, for the Claimant;

Frank A. King, Esquire, for the Nevada Industrial Commission;

Annette Kannenberg, representative, for the Employer.

D E C I S I O N

THE ABOVE-ENTITLED MATTER having been heard on August 7, 1980, and having been conducted in accordance with the provisions of Chapters 233B and 616 of the NRS; with testimony and evidence having been adduced, and after having reviewed the case, the Appeals Officer finds as follows:

On July 26, 1975, while employed as a pantry person by the Caesar's Palace Hotel and Casino, the claimant sustained a lumbosacral strain while lifting a case of melons.

The initial diagnosis was rendered by Robert W. Williams, M.D., neurosurgeon, and consisted of "Lumbosacral strain; L5-S1 Degenerative Intervertebral Disc". The doctor stated:

> "It would appear that the patient has a rather chronic lumbosacral strain and she is overweight. At this time there are no signs of

herniated disc disease but she has classical lumbosacral discogenic symptoms which are compatible with her x-ray and long-standing degenerative intervertebral disc problem at this level." (Emphasis added)

It was also noted that the claimant was overweight which is inferred as contributing to the symptomatology. The claimant was treated conservatively after which the claim was closed.

On December 20, 1976, Dennis P. Gordon, M.D., orthopedic surgeon, reported the same low-back findings as Dr. Williams and added the diagnosis of "Greater trochanteric bursitis". Neurological signs were normal. The claim was reopened, and the claimant was again treated conservatively on a p.r.n. basis, after which the claim was reclosed.

On July 31, 1979, Dr. Gordon reported that the claimant had mild arthritic symptoms and that he felt "that it is justified to open this woman's case for conservative care." This most recent reopening request was denied by the commission. The claimant has brought this appeal, asking for continued medical treatment.

Dr. Gordon's cryptic July 31, 1979, report, as a physician's certificate in support of reopening, is simply an insufficient basis upon which to conclude a finding of change in circumstance such as to warrant an increase or rearrangement of compensation. NRS 616.545.

Subsequent to Dr. Gordon's July 31, 1979, report, the claimant obtained a report dated March 10, 1980, from James W. Ogilvie, M.D., orthopedic surgeon. Dr. Ogilvie reported a diagnosis of mild exogenous obesity, marked degeneration at the L5-S1 interspace, left sciatica and lumbar spondylosis. He recommended a regime of treatment including a trial on a transcutaneous nerve

stimulator and an EMG study of the left lower limb.

In a March 21, 1980 letter addressed to the claimant's counsel, Thomas D. Armour, Jr., M.D., general surgeon, reported varicose veins of the lower extremities and stated his opinion that the cause of her current symptoms was sciatica.

On August 1, 1980, in a letter addressed to claimant's counsel, Dr. Ogilvie opined the "presence of a nerve root compression syndrome on the left, at the L-5, S-1 level" and added the gratuitous opinion that he felt that the probable disc was "a direct continuation of the injury [the claimant] suffered in 1975." His justification for this causation opinion was vague and apparently based upon history.

These new documents were examined by Frank Butters, M.D., medical advisor to the commission, and on April 25, 1980, he stated that Dr. Ogilvie's diagnoses of left sciatica and spondylosis "do not indicate conditions that are primarily industrial but conditions that could be aggravated by an industrial incident." He questioned whether the claimant's current complaints were industrial in origin.

DISCUSSION

At the time of the claimant's lifting injury in July of 1975, she already had fairly substantial evidence of a degenerative low-back condition as confirmed by x-rays showing a well-developed L-5, S-1 degenerative disc. Dr. Williams termed the condition a "long-standing degenerative intervertebral disc problem." The doctor also found no signs of a herniated disc. Now, some five years later, Dr. Ogilvie finds the clinical signs of a herniated disc at L-5, S-1 and infers that this is the cause of her current left-sided sciatica.

At best, the 1975 injury represented an aggravation of the

claimant's pre-existing degenerative spine. If an acute disc syndrome has developed since 1975, it is most probably idiopathic, the result of the ordinary progression and expected sequelae of the pre-existing degenerative disease rather than the "direct" product of the 1975 aggravation. At the core of Dr. Ogilvie's supportive reopening letter are the expected manifestations of L-5, S-1 acute disc, a condition that cannot be reasonably related to the 1975 aggravation and is most probably related to the ordinary progression of the progressive degenerative disc disease.

Accordingly, the final commission staff determination denying this claimant's most recent reopening request as affirmed by the Hearing Officer is hereby affirmed by the Appeals Officer.

DATED this 9th day of February, 1981.

APPEALS OFFICER

J. Michael McGroarty

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Review must be filed with the District Court within thirty (30) days after service by mail of this decision.

RECEIVED [illegible]

BEFORE THE APPEALS OFFICER

In the matter of the Contested Industrial Insurance Claim of RICHARD ROBERTS, Claimant

Claim Number: 74-35150

Appeal Number: 1770

Appeal by the Claimant from the decision of the Hearing Officer dated November 30, 1979.

Marvin S. Gross, Esquire, for the Claimant

Frank A. King, Esquire, for the Nevada Industrial Commission

Barbara Scarborough, of the Gibbens Company, for the Employer

D E C I S I O N

THE ABOVE-ENTITLED MATTER having been heard on December 1, 1980, and having been conducted in accordance with the provisions of Chapters 233B and 616 of the NRS; with testimony and evidence having been adduced, and after having reviewed the case, the Appeals Officer finds as follows:

The claimant sustained an injury by accident arising out of and in the course of his employment by Wells Cargo Inc. on April 26, 1974.

Following this accident, the claimant filed a timely claim for benefits with the Nevada Industrial Commission. He subsequently received substantial benefits for compensation and for treatment of his back.

On October 8, 1975, the claimant was rated for permanent partial impairment, by Joseph M. George, Jr., M.D., medical advisor to the NIC, and Dr. George found 33 percent impairment

on a body basis, including an allowance of 15 percent for compression fractures of T-11 and T-12, as well as 5 percent for the unoperated L5-S1 disc.

On December 13, 1976, the NIC authorized reopening of the claim for surgery at the L4-5 level, however, the claimant was not willing at that time to undergo surgery, and none was performed.

The claim was inactive for almost two years until November 16, 1978, when Francis Grenn, M.D., neurologist, reported the claimant had complaints of "constant backache daily extending to the left lower extremity at times." Dr. Grenn also reported gradual worsening of other complaints, stating that the claimant found his lower back pain to be 50 percent or less of his problem with the rest attributable to his pain in the T-11 region. The NIC denied reopening on the basis of insufficient information from this report, standing alone.

On December 18, 1978, Dr. Grenn reported that he had seen the claimant in follow-up and that he, the claimant, continued to have symptoms exacerbated by the seated position while working in heavy construction. Dr. Grenn reported that the claimant certainly has worsened since "his 1975 lumbar myelogram and that he, the claimant, cannot accept the diagnosis of a simple lumbar strain because of the ongoing pain that he must endure." Dr. Grenn then went on to reiterate that the claimant had two problems, one in the T11-12 area and the other in the low back region with accompanying leg symptoms, for which he, Dr. Grenn, "can state that he might well have an early HNP." Dr. Grenn described the claimant as being "adamant regarding determining the etiology of his problem", and proceeded to perform diagnostic tests.

On December 19, 1978, Dr. Grenn reported a follow-up examination of that date in which he found the pain to be worse

in the back bilaterally. Also, "Percodan had to be obtained from Dr. Zivot when the pain recently worsened greatly." At this point, the NIC authorized limited reopening of the claim for evaluation by Aaron Zivot, M.D., orthopaedist.

Dr. Zivot saw the claimant on December 20, 1978, and reported on December 29, 1978, his recommendation that the claim be reopened for further evaluation because of the continued severe pain.

On January 8, 1979, the claimant and his wife went to the emergency room of Sunrise Hospital at approximately 8:15 p.m. On the ER report the date of injury was shown as April 26, 1974, the date of the claimant's initial back injury. There was no mention of a new injury.

On January 23, 1979, the claimant signed a new claim form, 79-68404, indicating that he sustained a new injury while employed by Acme Electric on January 8, 1979, at approximately 2 p.m. This form reflects that he notified his employer of this injury on January 23, 1979, more than two weeks later. The nature of the injury, as reported by the claimant on the claim form was that he was lifting a power extension when a sharp pain hit in his back. On January 29, 1979, the NIC claims examiner wrote the claimant and advised him that his old claim had been reopened for further treatment on December 19, 1978, and that all benefits were to be paid under that claim.

On January 12, 1979, Dr. Zivot reported that he had seen the claimant in his office on January 9th, one day after the ER visit and that the claimant had complained of being awakened several times over the past two nights at three in the morning with back pain in the mid-lumbar area, not in the area of the old fracture (emphasis supplied by Dr. Zivot). Dr. Zivot also reported that on January 9, 1979, "the claimant's pain is mostly in the lumbar area."

The claimant received temporary total disability benefits under the old claim from January 9, 1979, through August 8, 1979 when his claim was closed. The claimant filed a timely Appeal of the closure of his old claim as well as the denial of his new claim.

On September 25, 1979, the claimant underwent surgery by Robert W. Williams, M.D., neurosurgen, which consisted of a total lumbar laminectomy of L5 with resculpturing of the lumbar spinal canal. Dr. Williams found lumbar spinal stenosis without herniated nucleus poposis at L4-5 or L5-S1.

On Appeal, the Hearing Officer reversed the NIC staff determination to close the claimant's claim on August 8, 1979 and further recommended that the NIC give favorable consideration to reversing its earlier decision to deny claim number 79-68404. The NIC then paid all compensation and accident benefits in question subsequent to the August 8, 1979 closure under the 1974 claim and the claimant commenced this appeal to the Appeals Officer.

It was the claimant's testimony that he sustained a specific accident and injury while working for Acme Electric on January 8, 1979, that this new injury involved his lumbar spine; and that his ongoing attempts to reopen his old claim in late 1978 were due to pain in the thoracic spine at the site of his old compression fractures. This testimony is inconsistant with Dr. Grenn's findings in late 1978 that approximately 50 percent of the claimant's complaints related to his lumbar spine. Also, this testimony is inconsistant with Dr. Zivot's report that on January 9, 1979, one day after the alleged new injury, when the claimant stated he had been awakened the previous two nights with low back pain.

The claimant's wife testified that a notation on the January 8, 1979, emergency room report of an April 26, 1974,

injury date was incorrect. The Appeals Officer finds her testimony to be inconsistant with the other testimony given.

The claimant did not sustain an injury by accident arising out of and in the course of his employment by Acme Electric on January 8, 1979, and is therefore entitled to receive benefits only under reopening of his initial claim, number 74-35150.

DATED this 29th day of January, 1981.

APPEALS OFFICER

Michael McGroarty

NOTICE: Pursuant to NRS 233B.130, should any party desire to appeal this final determination of the Appeals Officer, a Petition for Judicial Review must be filed with the District Court within thirty (30) days after service by mail of this Decision.

DEPT. OF ADMINISTRATION

FEB 17 1981

NEVADA DEPARTMENT OF ADMINISTRATION APPEALS OFFICER

BEFORE THE APPEALS OFFICER

In the Matter of the Industrial Insurance Claim of GARY FRIEDERICH

Claim Number: 79-9331

Appeal Number: 2049

Appeal by the Claimant from the decision of the Nevada Industrial Commission dated June 1, 1979.

Jack S. Grellman, Esquire
for the Claimant,

Robert Gibb, Esquire,
General Counsel for the
Nevada Industrial Commission

D E C I S I O N

THE ABOVE-ENTITLED MATTER was heard on December 7, 1979 and October 6, 1980 and conducted in accordance with the provisions of NRS Chapters 233B and 616 of the NRS and testimony and evidence was adduced.

The claimant Gary Friederich (hereafter Friederich) reported a right hand injury occurring on August 2, 1978, while employed as an iron worker for C.R. Tenison, Inc. Friederich's initial report of injury, Exhibit A, pg. 2, describes the accident and the nature of injury as follows:

"While prying two pieces of steel apart the pry bar slipped forward causing me to smash my hand into the steel column."

"Middle knuckle rt. (right?) hand swollen."

Initial medical treatment was provided by Gerald L. Dales, Jr., M.D. orthopedic surgeon, on August 22, 1978, for a contusion of the third metacarpal joint. X-ray examination disclosed no evidence of acute bony pathology, did demonstrate a small bony

4½ months

fragment adjacent to the fourth metacarpal head which had been reflected on previous x-ray studies performed in 1976 prior to the industrial accident, described further infra, and evidence of soft tissue swelling immediately dorsal to the third metacarpal head. Dr. Dales reported during September, 1978, that Friederich was essentially "status quo" with some residual swelling, and noted that,

> "I feel that the patient has a very strong body image, and coupled with his diffuse non-diagnostic joint problems, feel will have continued problems." Exhibit A, p 9.

At Friederich's request, a referral was made to Stanford Medical Center for evaluation by Michael Chan, M.D., and Andrei Calin, M.D., specialists in immunology during January and February, 1979. Dr. Chan noted a lengthy clinical history of joint problems predating the industrial accident, concluded that Friederich's condition fell into a category of enthesopathic disease, including possible differential diagnoses of Reiter's Syndrome, psoriatic arthritis, inflammatory bowel disease and ankelosing spondylitis. Exhibit A, p 14. Dr. Dale further stated with reference to the industrial accident of August, 1978,

> "Our advice is that people with enthesopathy, disease may possibly be exacerbated with injuries. We do not feel it is the cause of his disease since we really do not know what is the etiology of these entheospathics. (sic). Exhibit A, p. 14.

On February 13, 1979, after further examination, Dr. Chan reported that Friederich's arthritis seemed to be worse compared to previous visits and recommended alternative additional therapies.

On May 8, 1979, Dr. William J. Champion, M.D., medical

/////

advisor to the Commission, reviewed Friederich's file and recommended to the Commission that Friederich's problem was a generalized disease not connected with his injury. Further medical benefits were terminated, which termination was approved by the Commission, on June 1, 1979, concluding that Friederich's arthritic problem in both hands and feet was not related to the industrial injury of August 2, 1978. This appeal followed.

A hearing before the Appeals Officer was continued repeatedly at claimant's request to allow opportunity to secure additional medical evidence in support of his contentions, from mid-1979 through October, 1980. During those intervening months, Friederich sought and received additional medical evaluations at his own expense at American International Hospital, Zion, Illinois, by Theron G. Randolph, M.D., and George R. Kroker, M.D. Additionally, Friederich consulted with W. Scott Overturf, M.D., at Auburn General Hospital, Auburn, Washington.

The medical records and testimony of the claimant reflect a lengthy and significant history of bony joint problems predating the industrial accident in question. Approximately 16 years prior to the date of the industrial accident, while Friederich was in the United States Armed Services and stationed in the Orient, he began training in the field of karate over a lengthy period of time. Friederich actively participated in and later taught in the field of karate for many years. During this period of time, Friederich testified that he received numerous injuries to his hands and feet despite the fact that he believes his better than average physical conditioning prevented more serious injuries. Friederich stated:

"I spent a number of years tempering my hands and my body and applied these techniques in all aspects of

formal training. And I think that's possible that the next person would have a very severe injury. In fact, I am quite in tune with my own body; and I feel that because - - just because of that particular accident - - I had hurt my hands on other occasions; but, like I say, they immediately restored themselves to their natural condition.

"But after this particular accident, I knew that I had done something a little different than a normal training accident. It went beyond that." Transcript, pp.16-17.

Friederich's training in karate continued from 1963 on with the acquisition of a black belt in 1964, and Friederich's founding of the Nevada Karate Association and opening of the Nevada Karate School in 1966. Upon questioning concerning trauma to his hands resulting from his karate training and experience, the following colloquy took place:

"Q Could you explain the first time that you hurt them?

A I can just say, going back over a number of years that I have been involved with karate, that I have hurt various parts of my body being involved.

Q Well, approximately how many times since 1963 have you hurt your hands?

A Numerous occasions. I couldn't be explicit and give you a detailed number; but many times.

Q Would it be more than a dozen times a year?

A No, not more than a dozen times a year. But, you know I couldn't tell you. Maybe five times a year, six times a year; is that fair to say?

Q How about your toes and feet? Have you injured those

on an approximately equal basis?

A When I was active, yes, I could say that I have injured them from time to time. I can't say that it was five times a year; but the idea was to strength (sic) the various joints and muscles and mentally and physically condition yourself to be able to kind of ward off these types of injuries.

So that's the basic idea is to be able to condition your body and your joints and your mind so that you are less prone to injury.

So, for example, if the average were to hit a stack of boards or tiles with his feet or hands, perhaps he would break the various bones in his hands and his wrists or the top of his feet. But with a certain amount of training behind you, with years of training, you get to a point where when you execute these particular moves that you are less susceptible to injury than the untrained person." Transcript, pp. 29-30.

Friederich testified that upon being injured while residing in Japan, he did occasionally secure medical attention for broken bones or dislocated joints and stated that in Japan,

"...The practice of medicine for conditions like that is relatively simple. They might perhaps just place a flashlight under your hand and look at it and say it doesn't look too serious. And if in fact your finger is bent over at a 90-degree angle, they will pull it and tape it; and you are off and running again." Transcript, p. 31.

Friederich reports having consulted an herbologist physician in Hong Kong concerning his diagnosed gouty arthritic condition, and

reported sending his x-rays to various specialists around the country at medical schools and similar institutions including the Mayo Clinic, the University of California at Davis Medical School, the U.C.L.A. Medical School, and generally stated that he had previously been x-rayed and that the films of his joints had been sent off to various interests "all over the world,"

> "But there wasn't anybody of the people who I had gone to see that could come up with any remedy, anything that would help the problem." Transcript, p 46.

The testimony and medical records indicate that Doctors Kroker and Randolph at the Zion Hospital in Illinois, after extensive examination, recommended primarily dietary changes for Friederich having concluded apparently that certain foods caused an allergic reaction which exacerbated Friederich's arthritic condition.

The medical diagnosis relied upon by Friederich primarily in support of his contention that his industrial accident is causally related to his gouty arthritic problems is that of Theron G. Randolph, M.D., dated November 30, 1979, Exhibit K, which reads as follows:

> "I have recently reviewed your hospital record when you were hospitalized under my medical care between November 5, 1979 and November 27, 1979, at which time a diagnosis of arthritis (probably rheumatoid in type) apparently triggered by multiple food allegry and perirectal rash was made.
>
> "From details of the history, it is probable within a reasonable medical certainty that the traumatic injury to the hands sustained as a result of dropping steel on his hands in August, 1978, was responsible for non-

specifically precipitating a generalized exascerbation of rheumatic symptoms. A similar precipitation of multiple arthritic symptoms followed an injury in which you twisted your leg and ankle in a hunting accident in Decmeber, 1969." A number of factors affect the weight to be given and the interpretation of Dr. Randolph's letter. Friederich's original accident report reflects that a pry bar slipped causing him to smash his right hand against a steel column. Yet, some months later, Friederich began to report to treating physicians that a steel beam had dropped on both of his hands. It is clear that Dr. Randolph was under the impression that both hands had been struck by a heavy object even though the original claimed injury only related to the right hand. During his testimony, Friederich attempted to explain the discrepency reporting that both hands were hurt, with the right hand affected predominately. Yet the fact remains, that the accident as described by Friederich months after the incident and today is significantly inconsistent with the accident as first reported. Obviously, since the Commission was dealing only with the right hand injury it was very difficult for Friederich to explain the gouty arthritic exacerbation in his left hand and both feet.

Friederich's lengthy personal history of active, daily participation in karate, coupled with his lengthy medical history of diagnosis of gouty arthritis going back many years prior to the date of the injury, coupled with medical evidence of prior non-industrial injuries which temporarily exacerbated his arthritic condition, and the general medical conclusion of all consulting physicians that Friederich's primary medical problems relate to a non-traumatic rheumatoid type arthritic condition, clearly are inconsistent with Friederich's contention that the industrial

injury to his right hand in August, 1978 can be causally related to his wide-spread, and on-going rheumatoid problems.

After a complete review of the evidence and testimony, I enter the following:

Findings of Fact

1. Friederich reported an injury to his right hand on August 2, 1978 while actively employed as an iron worker by C.R. Tenison, Inc.

2. Friederich has a lengthy personal medical history of treatment of a gouty arthritic problem of a probable rheumatoid type which predates and postdates the date of the industrial accident.

3. Friederich has a lengthy history of personal participation in karate on a daily basis over more than 16 years, during which time the daily trauma to Friederich's hands and feet and other parts of his body resulted in frequent injuries to fingers, toes, and other bony joints, many of which required medical attention.

4. Friederich has solicited examinations and medical evaluations from numerous medical specialists of various types throughout the world and the United States, both prior to, and subsequent to the industrial accident in question, the consensus of which medical judgments reflect a gouty arthritic or rheumatoid arthritic problem of unknown etiology not directly related in a causal way to Friederich's industrial accident of August 2, 1978.

5. The strongest medical opinion which is supportive of Friederich's position is the report summarized by Theron G. Randolph, M.D., at Exhibit K, which reflects that a trauma to both hands was responsible for "non-specifically precipitating a generalized exacerbation of rheumatic symptoms."

6. Nowhere does Dr. Randolph or any physician indicate that

the trauma in August of 1978 is causally related to the rheumatic arthritic problem which predated that injury by many years on the contrary, Dr. Randolph solely indicates that an exacerbation of symptoms could well have resulted.

7. Friederich's claim was originally accepted by the Commissio as related to the injury to the right hand.

8. Friederich received at Commission expense appropriate benefits and medical treatment for that injury from Gerald Dales, M.D. orthopedic surgeon, who had treated Friederich for arthritic problems for some years prior and reported shortly after the date of injury that Friederich had returned to his status quo condition.

Conclusions of Law

1. Friederich sustained a right hand injury within the course and scope of his employment on August 2, 1978, which at most temporarily exacerbated a pre-existing rheumatoid arthritic condition in his hand.

2. Friederich received appropriate medical treatment from his personal treating physician for the exacerbation of his non-industrial arthritic problem and was returned to his status quo condition shortly after the injury.

3. The medical reports and results of examinations performed by various medical specialists throughout this country reflect that Friederich suffers from a wide-spread rheumatoid arthritic condition affecting numerous joints of his body which predated his industrial accident by many years and is not causally related.

4. The Nevada Industrial Commission has fully performed its obligation to provide appropriate medical benefits to Friederich for the results of his industrial accident of August 2, 1978, which medical treatment effectively returned him to his status quo condition as it existed prior to the date of that industrial

injury.

5. The medical evidence clearly reflects that it is medically and chronologically impossible for the industrial accident of August 2, 1978, to have caused his rheumatoid arthritic condition in both hands and in both feet.

6. The decision of the Commission to deny further medical benefits to Friederich dated June 1, 1979, was proper and lawful.

Order

IT IS HEREBY ORDERED that the Decision of the Commission dated June 1, 1979, be and it hereby is affirmed.

DATED this 17th day of February, 1981.

APPEALS OFFICER

James D. Salo

James D. Salo

NOTICE OF FINAL DECISION

AND

NOTICE OF RIGHT FOR JUDICIAL REVIEW

PLEASE TAKE NOTICE that on this date a final decision was rendered by the Appeals Officer, Hearing Division, Department of Administration, in the above-entitled matter; and

PLEASE TAKE FURTHER NOTICE that pursuant to NRS 233B.130, you have 30 days from the date of your receipt of the decision in which to file a petition in District Court should you desire judicial review of the Appeals Officer's decision in this matter.

-2/SB213 2/18 Exhibit — Sevigny's ofc (see page 5 ...)

STATE OF NEVADA
DEPARTMENT OF COMMERCE
BANKING DIVISION
CAPITOL COMPLEX
406 EAST 2ND STREET
CARSON CITY, NEVADA 89710
(702) 885-4260

EXHIBIT E

ROBERT LIST
GOVERNOR

JAMES L. WADHAMS
DIRECTOR

JOSEPH O. SEVIGNY
SUPERINTENDENT OF BANKS

February 18, 1981

669.010

3) It is the purpose of this chapter to bring under public supervision those persons who are engaged in or who desire to engage in the business of a trust company and charge a fee or receive compensation for such services, not in connection with banking business, and to insure that there is established in this state an adequate, efficient and competitive Trust Company service.

669.080

Inapplicability of chapter to banks, banking institutions, savings and loan associations, Attorneys, Collection Escrows, Title Companies, Non Profit Charitable Associations. This chapter does not apply to:

1) banks or banking institutions regulated under the provisions of chapters 657 to 668 inclusive of NRS.

2) Savings and loan institutions regulated under chapter 673 of NRS.

3) Any person, if the fiduciary relationship is not one of his principal occupations.

4) Title Insurers but only regarding Collection escrows.

5) Non Profit Charitable Associations where the Trustee or Trustees receive no fee or other compensation for services rendered.

DEFINITIONS; GENERAL PROVISIONS

669.010 Declaration of legislative intent. The legislature finds as facts and determines that:

1. There exists in this state a need, for the protection of the public interest, to regulate companies which are engaged in the trust company business.
2. Such trust companies should be licensed and regulated in such manner as to promote the public advantage and convenience.
3. It is the purpose of this chapter to bring under public supervision those persons who are engaged in or who desire to engage in the business of a trust company, not in connection with banking business, and to insure that there is established in this state an adequate, efficient and competitive trust company service.

(Added to NRS by 1969, 1184)

669.020 Definitions. As used in this chapter, unless the context otherwise requires, the words and terms defined in NRS 669.030 to 669.070, inclusive, have the meanings ascribed to them in such sections.

(Added to NRS by 1969, 1184)

669.030 "Community" defined. "Community" means a contiguous area of the same economic unit or metropolitan area as determined by the superintendent, and may include all or part of an incorporated city or several towns or cities.

(Added to NRS by 1969, 1184)

669.040 "Court trust" defined. "Court trust" means the action of a trust company acting under appointment, order or decree of any court as executor, administrator, guardian, conservator, assignee, receiver, depositary or trustee, or receiving on deposit money or property from a public administrator under any provision of this chapter or from any executor, administrator, guardian, conservator, assignee, receiver, depositary or trustee under any order or decree of any court.

(Added to NRS by 1969, 1184)

669.050 "Private trust" defined. "Private trust" means every other trust, agency, fiduciary relationship or representative capacity other than a court trust.

(Added to NRS by 1969, 1184)

669.060 "Superintendent" defined. "Superintendent" means the superintendent of banks.

(Added to NRS by 1969, 1184)

669.070 "Trust company" defined. "Trust company" means a corporation organized and licensed as provided in this chapter and engaged in trust company business.
(Added to NRS by 1969, 1184)

669.080 Inapplicability of chapter to banks, banking institutions, savings and loan associations. This chapter does not apply to banks or banking institutions regulated under the provisions of chapters 657 to 668, inclusive, of NRS or to savings and loan institutions regulated under chapter 673 of NRS.
(Added to NRS by 1969, 1184)

ORGANIZATION AND LICENSING

669.090 Unlawful transaction of trust company business without license. It is unlawful for any person, partnership, association, corporation or other legal entity to engage in the business of a trust company without complying with the provisions of this chapter and having a license issued by the superintendent.
(Added to NRS by 1969, 1184)

669.100 Minimum organization, operation requirements for capital, paid-up surplus. No trust company may be organized or operated after July 1, 1969, with a capital of less than $250,000, or in such greater amount as may be required by the superintendent, and paid-up surplus of $50,000, or in such greater amount as may be required by the superintendent. The full amount of the capital and surplus must be paid in cash, exclusive of all organization expenses, before the trust company is authorized to commence business.
(Added to NRS by 1969, 1185)

669.110 Incorporation by three or more persons. Any three or more persons, a majority of whom shall be residents of this state, may execute articles of incorporation and be incorporated as a trust company in the manner prescribed in this chapter.
(Added to NRS by 1969, 1185)

669.120 Contents of articles of incorporation.
1. The articles of incorporation shall contain:
(a) The corporate name adopted by the corporation, which shall be such as to distinguish it from any other trust company formed or incorporated in this state, or engaged in the trust business in this state.
(b) The place where its business is to be conducted.
(c) The purpose for which it is formed.
(d) The amount of its capital stock, which shall be divided into shares of the par value of not less than $25 each, except that upon the written approval of the superintendent the capital stock may be divided

EXHIBIT F

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT

S. B. 202

SENATE BILL NO. 202—COMMITTEE ON COMMERCE AND LABOR

FEBRUARY 10, 1981

Referred to Committee on Commerce and Labor

SUMMARY—Increases fine for violation of certain laws by contractors. (BDR 54-490)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to contractors; increasing the penalty for violating certain laws; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 624.360 is hereby amended to read as follows:

624.360 1. Any person violating any of the provisions of this chapter [is guilty of a misdemeanor and upon conviction shall be fined not less than $50.] *shall be punished:*

(a) For the first offense by a fine of not less than $150 nor more than $500; or

(b) For the second or subsequent offense by a fine of not less than $300 nor more than $500,

and may be further punished by imprisonment in the county jail for not more than 6 months.

2. Imposition of the penalty provided for in this section is not precluded by any disciplinary action taken by the board against a contractor pursuant to the provisions of NRS 624.300 to 624.305, inclusive.

EXHIBIT G

S. B. 221

SENATE BILL NO. 221—SENATOR GLASER (by request)

FEBRUARY 12, 1981

Referred to Committee on Commerce and Labor

SUMMARY—Repeals exemption of telegraph and telephone company employees from militia and jury duty. (BDR 58-604)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: No.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to telephones and telegraph; eliminating the exemption of operators, clerks and employees of telegraph and telephone companies from militia and jury duty; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 707.150 is hereby repealed.

EXHIBIT H

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT

S. B. 191

SENATE BILL NO. 191—COMMITTEE ON COMMERCE AND LABOR

FEBRUARY 5, 1981

Referred to Committee on Commerce and Labor

SUMMARY—Removes limit on number of appeals officers. (BDR 53-250)
FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: Executive Budget.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to industrial insurance; increasing the number of appeals officers; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. NRS 616.542 is hereby amended to read as follows:

616.542 1. The governor shall appoint [two] *three* appeals officers to conduct hearings in contested claims for compensation under this chapter and chapter 617 of NRS. Each appeals officer shall hold office for a term of 4 years from the date of his appointment and until his successor is appointed and has qualified. Each appeals officer is entitled to receive an annual salary in an amount provided by law for employees in the unclassified service of the state.

2. Each appeals officer must be an attorney who has been licensed to practice law before all the courts of this state for a period of at least 2 years. An appeals officer shall not engage in the private practice of law.

3. If an appeals officer determines that he has a personal interest or a conflict of interest, directly or indirectly, in any case which is before him, he shall disqualify himself from hearing [such] *the* case and the governor may appoint a special appeals officer who is vested with the same powers as the regular appeals officer would possess. The special appeals officer [shall] *is entitled to* be paid at an hourly rate, based upon the appeals officer's salary.

4. The decision of an appeals officer is the final and binding administrative determination of a claim under this chapter or chapter 617 of NRS, and the whole record consists of all evidence taken at the hearing before the appeals officer and any findings of fact and conclusions of law based thereon.

SEC. 2. This act shall become effective upon passage and approval.